BRB No. 05-0289 BLA

| | | |
|---|---|---|
| EDWARD L. SHERTZER | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| McNALLY-PITTSBURGH MANUFACTURING COMPANY | ) | DATE ISSUED: 09/21/2005 |
| | ) | |
| Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand – Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY, and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand – Awarding Benefits (00-BLA-0340) of Administrative Law Judge Rudolf L. Jansen with respect to a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The miner filed an application for benefits on August 4, 1983, which was finally denied by the district director on November 18, 1983 because the evidence did not establish the existence of pneumoconiosis or that the miner was totally disabled by a respiratory or pulmonary

impairment. Director's Exhibit 23. On February 24, 1992, the miner filed a second application for benefits. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d)(2000).

In a Decision and Order dated July 12, 1994, Administrative Law Judge Donald W. Mosser found that a material change in conditions under 20 C.F.R. §725.309(d)(2000) was established pursuant to the standard set forth in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988).[1] Director's Exhibit 27. Upon consideration of the merits of entitlement, however, Judge Mosser found that the miner failed to establish the existence of pneumoconiosis and total disability and denied benefits. *Id.*

The miner timely requested modification of the denial of the duplicate claim pursuant to 20 C.F.R. §725.310(2000). Judge Mosser denied the miner's request on April 10, 1997. Director's Exhibits 28, 40. In that proceeding, employer and the Director, Office of Workers' Compensation Programs (the Director), raised the threshold issue of a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), but Judge Mosser did not address the issue. He instead addressed the merits of the claim and found that the miner was totally disabled by a respiratory or pulmonary impairment, but that he had not established that he had pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 40. Upon consideration of the miner's *pro se* appeal, the Board remanded the case for the administrative law judge to reconsider the medical opinion evidence regarding the existence of pneumoconiosis. *Shertzer v. McNally Pittsburg Mfg. Co.*, BRB No. 97-1121 BLA (Jun. 26, 1998)(unpub.); Director's Exhibit 41. Judge Mosser denied benefits on remand in a Decision and Order issued on May 27, 1999. Director's Exhibit 42.

The miner died while the case was on remand to Judge Mosser. On the miner's behalf, the miner's widow timely filed a second request for modification of the denial of the miner's duplicate claim and submitted additional medical evidence, including the results of an autopsy. Director's Exhibit 43. Employer and the Director again raised the issue of a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). Director's Exhibit 50. Prior to the scheduled hearing before Administrative Law Judge Rudolf L. Jansen (the administrative law judge), the parties waived their right to a hearing and requested a decision on the record. In the ensuing Decision and Order, the administrative law judge found that the evidence submitted in the duplicate claim, when considered with the evidence submitted on modification, demonstrated a material change in conditions as required by 20 C.F.R. §725.309(d)(2000) by establishing that the miner

[1] Subsequent to the issuance of the administrative law judge's Decision and Order, the *Spese* standard was rejected by the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises. *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996).

had pneumoconiosis arising out of coal mine employment. The administrative law judge further found that the miner was totally disabled by a respiratory or pulmonary impairment and that his total disability was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. Employer appealed to the Board.

In a Decision and Order issued on July 30, 2002, the Board acknowledged that the administrative law judge's analysis of the material change in conditions issue did not entirely conform to the standard adopted by the United States Court of Appeals for the Tenth Circuit in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996). Nevertheless, the Board affirmed the administrative law judge's findings under Section 725.309(d)(2000) and the award of benefits on the merits, holding that the administrative law judge's findings that the newly submitted evidence established the existence of pneumoconiosis and total disability due to pneumoconiosis satisfied the *Brandolino* standard. *Shertzer v. McNally Pittsburg Mfg. Co.*, BRB No. 01-0197 BLA (Jul. 30, 2002)(unpub.).

Employer appealed to the Tenth Circuit, which vacated the Board's Decision and Order. The court held that the administrative law judge's finding of a material change in conditions could not be affirmed because the administrative law judge did not compare the evidence from the correct time periods to determine whether the miner had established a material worsening in the elements of entitlement adjudicated against him. Thus, the court remanded the case and instructed the administrative law judge to compare the evidence submitted in conjunction with the miner's duplicate claim and the two subsequent requests for modification to the evidence submitted with the miner's initial application for benefits. *Shertzer v. McNally Pittsburg Mfg. Co.*, 89 Fed. Appx. 152, 2004 WL 238863 (10th Cir. 2004).

On remand, the administrative law judge determined that the miner's condition regarding the existence of pneumoconiosis and total disability had materially worsened between the denial of his 1983 claim and the time of his death in 1998. The administrative law judge further found that the miner was entitled to benefits on the merits. Accordingly, the administrative law judge awarded benefits. Employer argues on appeal that the administrative law judge did not properly apply the *Brandolino* standard in finding a material change in conditions established pursuant to Section 725.309(d). Employer also maintains that the administrative law judge did not properly weigh the medical opinions relevant to the existence of pneumoconiosis and total disability due to pneumoconiosis. The miner's widow has responded on his behalf and urges affirmance of the award of benefits. The Director has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and

may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In considering whether a material change in conditions was established with respect to the existence of pneumoconiosis, the administrative law judge compared the evidence submitted with the miner's 1992 duplicate claim and requests for modification to the evidence submitted in conjunction with his 1983 claim. Regarding the x-ray evidence, the administrative law judge found that a material worsening in condition was not demonstrated, as both the prior and newly submitted x-ray evidence was negative for pneumoconiosis. Decision and Order on Remand at 5, 10. The administrative law judge then determined that the newly submitted autopsy and medical opinion evidence was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2) and (a)(4). *Id*. at 6-7.

The administrative law judge further noted that in accordance with the Tenth Circuit's remand instructions, he was required to make a separate finding on the issue of a worsening in condition. Decision and Order on Remand at 10. The administrative law judge cited cases in support of the proposition that pneumoconiosis is a progressive disease. He then determined, based upon Dr. Green's opinion in the newly submitted evidence, diagnosing fibrosis, and the medical records detailing the progression of the miner's fibrosis, that a worsening in the miner's condition had been demonstrated. *Id*. at 10-11.

Employer contends that the administrative law judge erred in finding a material change in conditions established regarding the existence of pneumoconiosis, as the administrative law judge merely applied a presumption that pneumoconiosis is a progressive disease. Employer also maintains that Drs. Green and Koenig, to whom the administrative law judge accorded great weight, did not state that claimant's condition had worsened since the denial of his 1983 claim.

We hold that employer has not set forth a meritorious allegation of error. Contrary to employer's statement, the administrative law judge did not rely upon Dr. Koenig's opinion in finding a material change in conditions established. In addition, although the administrative law judge cited cases which stand for the principle that pneumoconiosis is a progressive disease, he did not base his finding of a material worsening upon this principle. Rather, the administrative law judge acted rationally in relying upon the opinion in which Dr. Green stated that the miner's objective pulmonary function tests showed that the miner's condition deteriorated over time and the treatment records which indicated that the miner's fibrosis and accompanying pulmonary impairment progressively worsened until the time of his death. Decision and Order on Remand at 10; Director's Exhibits 22, 25; Claimant's Exhibit 3; *Brandolino*, 90 F.3d at 1512, 20 BLR at 2-321; *Carson v. Westmoreland Coal* Co., 19 BLR 1-18 (1994). We therefore affirm the

administrative law judge's finding that the miner's condition regarding the existence of pneumoconiosis materially worsened subsequent to the denial of his 1983 claim.

Turning to the element of total disability, the administrative law judge determined that the pulmonary function study (PFS) submitted with the 1983 claim was nonqualifying, while the two valid PFS's submitted after the denial of that claim are qualifying.[2] Decision and Order on Remand at 11, 13. The administrative law judge noted that the qualifying PFS's are supported by the narrative medical evidence submitted since the 1994 denial, but that he could not make a comparison to the narrative evidence proffered in conjunction with the 1983 claim because the only medical opinion submitted with that claim contained no discussion of total disability. *Id*. at 13; Director's Exhibit 25. Relying solely upon his determination that the valid, newly submitted PFS's produced qualifying values, the administrative law judge concluded that there was a material worsening in the miner's condition on the total disability element.

Employer argues that because the administrative law judge did not make a finding as to the miner's actual height and did not address the fact that the miner's age at the time that he performed the most recent PFS of record was beyond the last age appearing on the tables in Appendix B to Part 718, his material change in conditions finding on the issue of total disability cannot be affirmed. This contention has merit. When the miner performed the most recent PFS on May 15, 1995, he was seventy-three years old and his height was recorded as sixty-five inches. Director's Exhibit 38. Although the values produced on both the pre- and post-bronchodilator tests are qualifying for seventy-one-year-old males of that height, as employer indicates, the absence of values for seventy-three-year-old males in Appendix B renders these test results ambiguous. The conflicting heights recorded for the miner on the other studies of record increase the ambiguity. Director's Exhibits 7, 8.

The mere fact that the miner's age exceeded the table values does not require a determination that the May 1995 PFS cannot support a finding of total disability. An administrative law judge may rationally determine, by extrapolation from the existing tables, that the values are qualifying for a seventy-three-year-old man, but he must explain the process that he used. *See generally Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). In addition, a finding of fact as to the miner's actual height is required when the use of a different height than that recorded for the specific test at issue could alter its classification as qualifying or nonqualifying. *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). The administrative law judge's Decision and Order does not contain either

[2] The administrative law judge indicated that the newly submitted pulmonary function study obtained in 1994 was invalidated by Dr. Long. Decision and Order on Remand at 11; Director's Exhibit 7.

of these items. We also note that the administrative law judge did not accurately characterize the newly submitted PFS dated April 16, 1992. Contrary to the administrative law judge's finding, this study did not produce qualifying values for a male who was seventy years old and whose height was equal to or less than sixty-six inches. Director's Exhibit 7; *see* Appendix B to 20 C.F.R. Part 718.

For these reasons, we must vacate the administrative law judge's determination that the newly submitted PFS evidence established a material worsening in the miner's condition because the valid, newly submitted PFS's are qualifying. This case is remanded to the administrative law judge for reconsideration of whether material worsening has been established with respect to the element of total disability based upon a comparison of the evidence submitted with the miner's 1983 claim to the evidence submitted subsequent to the denial of that claim. *Brandolino*, 90 F.3d at 1512, 20 BLR at 2-321.

We will now address employer's allegations of error regarding the administrative law judge's finding that the evidence of record, as a whole, is sufficient to establish that the miner had pneumoconiosis and was totally disabled by it. Employer argues that the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(4), 718.203(c), and 718.204 must be vacated, as the administrative erred in crediting the opinions of Drs. Koenig, Heidingsfelder, and Green because they relied on a ten-year coal mine employment history when the miner was credited with six years of coal mine employment. Employer also argues that the administrative law judge erred in finding that Dr. Green's opinion diagnosing pneumoconiosis arising out of coal mine employment and a severe pulmonary impairment was entitled to more weight than the opinion in which Dr. Tomashefski attributed the miner's condition to idiopathic pulmonary fibrosis unrelated to dust exposure in coal mine employment.

These contentions are without merit. The administrative law judge's Decision and Order reflects that he took the discrepancy regarding the length of claimant's coal mine employment into account when considering Dr. Koenig's opinion and found that although it detracted somewhat from its value, Dr. Koenig's opinion was entitled to probative weight. Decision and Order on Remand at 7; Claimant's Exhibit 11. Dr. Heidingsfelder attributed the miner's lung disease to coal mine employment assuming an employment history of six years. Employer asserts that Dr. Heidingsfelder's statement to that effect was mere speculation, but the doctor explained that he reached this conclusion because the miner's less-than-twenty-year smoking history did not explain his severe lung disease, and the miner had no other occupational dust exposure. Director's Exhibit 43. With respect to Dr. Green's opinion, the administrative law judge acted within his discretion in finding that Dr. Green's diagnosis of pneumoconiosis was reasoned and documented, as Dr. Green described the type of particles seen on microscopic examination of the miner's lungs, rationally linked them to the miner's coal mine

employment, and ruled out other potential sources of dust exposure. Decision and Order on Remand at 6; Claimant's Exhibit 3; *see Mays v. Piney Mountain Coal Co*., 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting).

The effect of an inaccurate employment history on the credibility of a medical opinion "is a determination to be made by the administrative law judge." *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988). The administrative law judge in this case reasonably resolved the issue and the Board will not reweigh the evidence or substitute its inferences for those of the administrative law judge. *Mays*, 21 BLR at 1-64. Consequently, we reject employer's allegation of error regarding his weighing of the opinions of Drs. Koenig, Heidingsfelder, and Green.

Employer argues further that the administrative law judge erred in according less weight to Dr. Tomashefski's opinion, which employer asserts was documented and reasoned. Contrary to employer's contention, the administrative law judge acted within his discretion when he found that, viewed in context, Dr. Tomashefski's diagnosis of idiopathic pulmonary fibrosis lacked "the sophistication, explanation, and documentation of Drs. Green and Heidingsfelder," because these physicians, particularly Dr. Green, provided a detailed discussion of why the evidence supported a diagnosis of mixed dust pneumoconiosis and cited relevant journal articles in support of this finding. Decision and Order on Remand at 6-7; Director's Exhibit 44; Employer's Exhibit 1; *see Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Additionally, the record supports the administrative law judge's determination to give additional weight to Dr. Green's opinion based upon his documented credentials in the research field of occupational lung disease. Claimant's Exhibit 3; *see Hansen*, 984 F.2d at 368, 17 BLR at 2-55; *Dillon v. Peabody Coal Co*., 11 BLR 1-113, 1-114 (1988).

Because the administrative law judge's findings with respect to the medical evidence are rational and supported by substantial evidence, they are affirmed. We also affirm, therefore, the administrative law judge's findings that the opinions of Dr. Koenig, Green, and Heidingsfelder, when considered together, are sufficient to establish that the miner had pneumoconiosis arising out of coal mine employment and was totally disabled by it.

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

_____

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, J., concurring and dissenting:

I concur in the majority's decision except in its determination to vacate the administrative law judge's finding under *Wyoming Fuel Co., v. Director [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996) that claimant established a material change in conditions in the element of total disability pursuant to 20 C.F.R. §725.309. I would affirm the administrative law judge's decision awarding benefits.

The majority agrees with employer's argument that the administrative law judge's finding of a material change cannot be affirmed because the administrative law judge did not explain how he determined the two valid pulmonary function studies in the record of the current claim are qualifying. Employer correctly observes that the administrative law judge did not make a finding of the miner's height and that the miner's age exceeds the table values. Employer does not suggest, however, that there is any reasonable analysis of these study results which could support the conclusion that they are non-qualifying. It is not enough to demonstrate that the administrative law judge erred by failing to provide a full discussion of the evidence. Employer must show that it was unduly prejudiced by the error, *i.e.*, that the error was not harmless. *See generally Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990); *Big Horn Coal Co. v. Temple*, 793 F.2d 1165 (10th Cir. 1986). Employer has not even attempted to make the requisite showing.

Furthermore, the issue under *Brandolino* is not whether the pulmonary function study results in the current claim are qualifying, but whether they show a material

worsening in the miner's condition since the prior denial. *Brandolino*, 90 F.3d at 1510-11, 20 BLR at 2-317-19. The record reflects that the administrative law judge credited Dr. Green's opinion that the pulmonary function study results from 1983-1995 showed a progression of pulmonary impairment to the point of severity. Decision and Order at 10; Claimant's Exhibit 3 at 2. Dr. Green's opinion constitutes substantial evidence supporting the administrative law judge's determination that the pulmonary function study results prove that the miner's condition materially worsened after the denial of the prior claim.

Hence, the administrative law judge did not err in finding that the evidence established a material change in conditions under the *Brandolino* standard. Employer's argument to the contrary is devoid of merit. Accordingly, the administrative law judge's Decision and Order awarding benefits should be affirmed.

_____

REGINA C. McGRANERY
Administrative Appeals Judge